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No. 08-938

Sup. Court of the U.S.
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**In The
Supreme Court of the United States**

PHAR-MOR, INC.,

Petitioner,

v.

MCKESSON CORPORATION,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

In its Petition for Writ of Certiorari (Petition), the Debtor Phar-Mor, Inc. (Debtor) identifies an issue under the Uniform Commercial Code (UCC) regarding the supposed priority of secured creditors over reclaiming sellers as to reclaimed goods and, in so doing, makes almost no mention of the then operative and dispositive section of the Bankruptcy Code, 11 U.S.C. § 546(c)(2) (1998) (amended in 2005 by Pub. L. 109-8 § 1227(a)). Respondent, McKesson Corporation (McKesson) strongly disagrees with the issue framed by the Debtor. McKesson also disagrees with the Debtor's claim that this matter has "exceptional importance." This is particularly true here where the operative and dispositive bankruptcy statute was substantially amended in 2005 and, concurrently, a new statute was enacted that now governs the core issues raised by this case.

The actual issues before the Bankruptcy Court and the ones which were affirmed by the Sixth Circuit are as follows:

Whether the Bankruptcy Court properly denied the Debtor's request to reclassify McKesson's reclamation claim from an administrative claim to a general unsecured claim, and whether the Bankruptcy Court properly applied the statutory language of former 11 U.S.C. § 546(c)(2) in awarding McKesson an administrative claim for the \$8.6 million of goods that McKesson delivered

**COUNTER-STATEMENT OF
QUESTIONS PRESENTED – Continued**

on the eve of the Debtor's bankruptcy filing and then sought to reclaim.

In addition to these issues, there remains an unresolved issue which was not addressed by the Sixth Circuit or either of the two lower courts:

Whether, in the absence of a secured creditor, the Debtor has standing to assert rights of secured party under § 2-702 of the UCC.

But it is unnecessary to resolve this issue because the Debtor's Petition should be denied.

CORPORATE DISCLOSURE STATEMENT

Respondent is McKesson Corporation, a publicly traded corporation under the market symbol MCK. There are no parent corporations or publicly held companies owning 10% or more of Respondent's stock.

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STATEMENT OF THE CASE

In September 2001, on the eve of a Chapter 11 filing, petitioner Phar-Mor, Inc. (Debtor) purchased over \$18 million dollars in goods on credit from McKesson and 140 other vendors. It did so with full knowledge that it intended to file bankruptcy days later. These pre-bankruptcy purchases were not typical; they were fraudulent. Both the Uniform Commercial Code (UCC) and the Bankruptcy Code contain provisions to protect vendors from this kind of fraud. UCC § 2-702 allows defrauded vendors the right to reclaim their goods, while former 11 U.S.C. § 546(c)(2) required that reclaimed goods either be returned or the reclaiming seller be granted an administrative claim or a replacement lien.

In this case, the Bankruptcy Court did exactly what was required by statute: It awarded McKesson, as a defrauded reclaiming seller, an administrative claim for the value of its reclaimed goods. Then, one and a half years later, the Bankruptcy Court denied the Debtor's request to reclassify McKesson's administrative claim as a general unsecured claim (Reclassification Motion). Both the District Court for the Northern District of Ohio and the Sixth Court affirmed that decision.

In a brazen attempt to generate interest in Supreme Court review, the Debtor proclaims that the Sixth Circuit's decision, among other dire consequences, will have a "devastating impact upon secured loan transactions." The Debtor also contends

that the decision “strips” asset based lenders of their “priority interest in inventory collateral.” No evidence supports these hyperbolic statements. In fact the evidence is the contrary. As evidenced by the recent rash of large corporate bankruptcy cases, many of which involve some of this nation’s largest retailers, asset based lenders have maintained their security interests in all of their collateral, including inventory legitimately acquired, and lending to these types of companies has not been disrupted.

The issues raised in this case have not arisen in these more recent bankruptcy cases (filed since July 2008). This is due, in part, to the fact that the operative statute in this case no longer exists. In 2005, substantial amendments were made to 11 U.S.C. § 546(c) and 11 U.S.C. § 503(b)(9) was enacted. The end result of those amendments is that any seller that delivers goods to a debtor within 20 days of bankruptcy is automatically entitled to an administrative claim.

In arguing for Supreme Court review, the Debtor also disregards the Sixth Circuit’s analytical framework, which rests on the application of the plain text of 11 U.S.C. § 546(c)(2) (1998) (amended in 2005 by Pub. L. 109-8 § 1227(a)). Indeed, the Petition contains only two brief mentions of this statute. The Debtor hopes that by ignoring the operative bankruptcy statute and then proclaiming the Sixth Circuit’s decision as having a “devastating” impact on asset based lending and businesses, it can convince this Court to grant *certiorari*. The Sixth Circuit correctly

applied the plain text of § 546(c)(2) of the Bankruptcy Code, as well as its existing precedents. The Sixth Circuit's decision represents a mere reaffirmation of decades of precedent, both under pre-UCC common law and under the UCC, regarding the relative rights of defrauded, reclaiming sellers vis-à-vis debtors and secured creditors. There is nothing remarkable about this decision which would warrant Supreme Court review.

RESPONSE TO STATEMENT OF FACTS

The Debtor's factual recitation contains three materially misleading or omitted facts. Those facts further justify denial of the Petition.

The Debtor states that, at the outset of its bankruptcy case, its pre-petition lenders increased the amount of the secured loan by \$35 million in debtor in possession financing (DIP Financing). The truth, however, is quite different and perhaps is best summarized by United States District Judge Boyko, in his affirmation of the Bankruptcy Court's order denying the Reclassification Motion.

Referencing [the] Final DIP Order, Judge Bodoh found that the Pre-Petition debt was fully satisfied and that there was no transfer or assignment of any lien or security interest to the DIP Lenders. . . . Judge Bodoh found that the Pre-Petition Lenders elected to release their security interests and were paid in full, and that their security interests were

not assigned or preserved. . . . [McKesson's] [r]eclamation claim . . . deserved to be granted an administrative priority pursuant to United States Bankruptcy Code § 546(c).

Appendix B, page 18a.

The Debtor frequently speaks of secured lenders and how their rights will be impacted in this and perhaps other cases. Yet, the Debtor fails to mention that there are no longer any secured lenders in this case. The DIP Lenders were paid in full in 2002. This is another key fact that supports denial of the Petition.¹

Lastly, the Debtor fails to mention that in addition to paying the DIP Lenders in full, the Debtor received over \$155 million in revenue. Much of the revenue was generated from, or ascribed to, inventory which the Debtor fraudulently procured from sellers on the eve of bankruptcy.

¹ Throughout this litigation, McKesson has disputed the Debtor's standing to assert the rights of non-existent secured creditors. Undeterred, the Debtor argues in its Petition that the decision deprives secured creditors of their supposed senior security interest in inventory. While the Sixth Circuit (and the lower courts) did not address this standing issue, it remains valid and provides an independent basis upon which the Petition must be denied.

REASONS EXIST WHY THE PETITION MUST BE DENIED

A. The Sixth Circuit Properly Applied the Plain Text of § 546(c)(2) and Existing Circuit Precedent.

The Petition makes it appear that the only relevant statute at issue is § 2-702(C) of the Ohio UCC and this appeal somehow involves a lien priority dispute between McKesson and the Debtor's DIP Lenders. That is not the case. The only issue on appeal was whether the Bankruptcy Court properly denied the Reclassification Motion and, correspondingly, properly granted McKesson an administrative claim after the Debtor refused to return the reclaimed goods to McKesson.

The pertinent Bankruptcy Code section (now amended) is 11 U.S.C. § 546(c). That statute provided, in part:

§ 546. Limitations on avoiding powers

* * *

(c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but —

(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor; and

(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court –

(A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or

(B) secures such claim by a lien.

The Sixth Circuit held that, under the plain text of § 546(c)(2), McKesson was properly granted an administrative claim on account of its unfulfilled reclamation demand.

It appears clear from the plain language of this statute that McKesson had the *right* to reclaim the goods delivered to Phar-Mor. *See id.* at § 1302.76(B). This finding – that McKesson had a right to reclaim the goods – would seem to answer the pending question and end our analysis; the court, having denied reclamation, was indeed obligated to grant McKesson a priority on its claim, which it did by granting the administrative-expense priority in the amount of the goods.

Phar-Mor, Inc. v. McKesson Corp., 534 F.2d 502, 505 (6th Cir. 2008); App. 7a-8a.

Correspondingly, the Sixth Circuit rejected Phar-Mor's contention that the DIP Lenders' security interest defeated McKesson's entitlement to an administrative claim under 11 U.S.C. § 546(c)(2). In so doing, the Sixth Circuit adopted a similar analysis to that employed by the Bankruptcy Court when it denied the Reclassification Motion:

Debtors maintain that all of the goods that were subject to Vendors' Reclamation Demands were sold during the [case], and the proceeds thereof were applied to repay Debtors' obligations under the DIP Facility. No action on the part of a debtor should be permitted to defeat a seller's right to reclamation. [citations omitted.] A debtor's decision to grant a security interest in inventory to a *subsequent* secured lender cannot defeat a seller's reclamation rights if the seller asserted its rights before the security interest is granted. Moreover, the Interim and Final DIP Orders explicitly prohibit Debtors from returning the goods constituting collateral under § 546(c) of the Bankruptcy Code. Therefore, having notice of the Reclamation Demands, DIP Lenders cannot qualify as good faith purchasers under § 2-702(3).

In re Phar-Mor, Inc., 301 B.R. 482, 497 (Bankr. N.D. Ohio 2003); App. 64a.

B. The DIP Lenders Were Not "Good Faith Purchasers."

Key to the Petition is the repeated declaration that the DIP Lenders were good faith purchasers and that all secured creditors qualify as "good faith purchasers" and enjoy the protections of UCC § 2-702(C). Yet, the Debtor blithely ignores the actual facts of the case, as found by the Bankruptcy Court, and twice affirmed by the reviewing courts.

At an evidentiary hearing, McKesson proved that the DIP Lenders knew of the reclamation demand before they made the DIP loan and, as a result, did not qualify as "good faith purchasers" under UCC § 2-702(C). The Bankruptcy Court agreed and found that the DIP Lenders were not good faith purchasers. *Phar-Mor, Inc.*, 301 B.R. at 497; App. 64a. The Sixth Circuit agreed that DIP Lenders were not good faith purchasers. It did so based upon similar analysis to that employed by the lower courts.

The Sixth Circuit properly reached this conclusion based on the facts of this case. Neither the Bankruptcy Code nor the UCC defines the term "good faith purchaser."² However, the Sixth Circuit properly applied the prevailing definition for good faith purchaser in bankruptcy and non-bankruptcy cases: "one

² The UCC does define, independently, the terms "good faith" and "purchaser." But the term "good faith purchaser" has three distinct words which, when combined, have a well-established meaning.

who purchases the assets for value, in good faith, and without notice of adverse claims." *In re Made in Detroit, Inc.*, 414 F.3d 576, 581 (6th Cir. 2005); *Willemain v. Kivitz (In re Willemain)*, 764 F.2d 1019, 1023 (4th Cir. 1985) (defining "good faith purchaser" as "one who purchases the assets for value, in good faith, and without notice of adverse claims"); *Greylock Glen Corp. v. Community Sav. Bank*, 656 F.2d 1, 4 (1st Cir. 1981) (same). Here, as the Bankruptcy Court determined, the DIP Lenders had prior knowledge of McKesson's reclamation demand prior to making the DIP loan and thus did not qualify as "good faith purchasers" with respect to McKesson's reclaimed goods. For these reasons, every reviewing court has concluded that the DIP Lenders were not good faith purchasers and, as a result, there was no basis to deprive McKesson of its administrative claim, even assuming that was permissible under 11 U.S.C. § 546(c)(2). Without even the possibility of an actual "good faith purchaser," the Debtor has no legitimate grounds to seek further appellate review of this factual issue.

C. There is No Circuit Split Which Warrants Further Appellate Review.

In an attempt to convince further appellate review, the Debtor argues that the Sixth Circuit's decision is in conflict with the Fifth Circuit's decision in *Stowers v. Mahon (In re Samuels & Co.)*, 526 F.2d 1238 (5th Cir. 1976), *cert. denied*, 429 U.S. 834 (1976). There is no inter-circuit conflict.

Samuels was a pre-Bankruptcy Code case involving a priority dispute over sale proceeds between the seller of cattle and a debtor's secured creditor. As between those two parties, the Fifth Circuit (over a vigorous dissent) ruled that the sale proceeds belonged to the secured creditor.

In contrast, the present case did not involve a priority dispute between McKesson and the DIP Lenders. The Debtor's DIP Lenders were paid in full during the course of the bankruptcy case. Rather, this case involved the question as to whether McKesson, as a reclaiming seller was entitled to an administrative claim in the Debtor's bankruptcy case under 11 U.S.C. § 546(c) when the Debtor used McKesson's reclaimed goods in the bankruptcy case.

Moreover, unlike *Samuels*, the Bankruptcy Court here conducted an evidentiary hearing on whether the Debtor's lenders qualified as good faith purchasers under § 2-702(C) of the UCC. Based upon language in the then operative DIP loan documents, McKesson established that the Debtor's DIP Lenders knew of the reclamation claims and did not qualify as good faith purchasers. The Debtor, on the other hand, failed to present any evidence to refute this fact. Based upon the evidence presented, the Bankruptcy Court agreed with McKesson and specifically ruled that the DIP Lenders were not good faith purchasers. This fact further distinguishes this case from *Samuels*.

In the 30 years since the Bankruptcy Code was enacted and prior to the Sixth Circuit's decision here,

only one other Circuit directly addressed the prior version of 11 U.S.C. § 546(c) and the issue of a reclaiming seller's entitlement to an administrative claim under that statute. The Eighth Circuit specifically upheld the reclaiming seller's entitlement to an administrative claim, when the reclaimed goods are consumed or disposed of during the course of the bankruptcy case. See *Griffin Retreading Co. v. Oliver Rubber Co. (In re Griffin Retreading Co.)*, 795 F.2d 676 (8th Cir. 1986). As the *Griffin* court aptly noted:

In this case the right to reclaim was meaningless since Griffin sold the goods thus removing them from the corpus of the bankrupt's assets. The only logical solution would have been to grant the administrative expense under § 546(c)(2)(A) or secure such claim by a lien under § 546(c)(2)(B). . . . The granting of an administrative claim under § 546(c)(2)(A) is not inconsistent with the right to reclaim, but supplements that right. It provides additional protection to a seller who has delivered goods to a bankrupt debtor on the eve of the bankruptcy. It provides flexibility to the bankrupt estate by permitting the use of the property, if needed for the successful completion of the plan of reorganization. In such case the seller is protected without placing the plan in jeopardy.

This court need not address the interest of the secured creditor []. The conflicting interest of a secured creditor vis-à-vis the rights of the reclaiming creditor, and the question

of whether a creditor holding a valid security interest in the debtor's inventory is a good faith purchaser or lien creditor . . . , must await the day when the conflict between such competing interests is ripe for determination. [S]ince this action is not one between the competing interests of the reclaiming creditor and the secured creditor, but rather involves the narrower issue of the appropriateness of granting the alternative remedies under 11 U.S.C. § 546(c)(2)(A) or (B), such cases are not dispositive.

Id. at 679-80.

The Sixth Circuit's decision affirming McKesson's administrative claim was consistent with its prior decisions in *In re Mel Golde Shoes*, 403 F.2d 658 (6th Cir. 1968) and *In re Federal's, Inc.*, 553 F.2d 509 (6th Cir. 1977) and the Eighth Circuit decision in *Griffin Retreading*.

In its Petition, the Debtor relies on five main bankruptcy court decisions to support stripping McKesson of its \$8.6 million administrative claim. The Sixth Circuit correctly found that those cases, and several others, ignored years of Circuit Court precedent protecting the rights of reclaiming sellers, disregarded the plain language of 11 U.S.C.

§ 546(c)(2), and were not practical, in that they eviscerated the remedy of reclamation.³

For example, as noted by the Sixth Circuit, the Sixth Circuit Bankruptcy Appellate Panel in *In re Pittsburgh-Canfield Corp.*, 309 B.R. 277 (BAP 6th Cir. 2004) completely overlooked the Sixth Circuit's decisions in *Mel Golde Shoes* and *Federal's*. The Sixth Circuit also correctly noted that the *Pittsburgh-Canfield* court failed to understand that a reclaiming seller's priority rights cannot be dependant on the post-petition conduct of a debtor, such as consensually encumbering assets in favor of a DIP lender.

The Debtor asserts that all of the reported cases are uniform and support the conclusion that "the right of reclamation is subject to the rights of secured creditors" and therefore McKesson is not entitled to an administrative claim under 11 U.S.C. § 546(c) (1998). This is not true. Numerous cases, including

³ The Debtor attempts to make much of the fact that several of the bankruptcy decisions that the Sixth Circuit rejected were issued by two judges in the Southern District of New York, who by happenstance of bankruptcy venue rules and the tactical decision of debtors to bypass their home forums, preside over large bankruptcy cases. Merely because these judges handle large bankruptcy cases does not validate the flawed legal analysis contained in their decisions. To the contrary, Congress' 2005 amendment to § 546(c) and the inclusion of § 503(b)(9), through which any seller of goods on credit within 20 days of bankruptcy automatically receives an administrative claim, evidences Congressional repudiation of these judges' aberrant decisions.

the Eighth Circuit's decision in *Griffin*, hold otherwise. See e.g., *Griffin Retreading Co.*, 795 F.2d at 680; *In re Diversified Food Serv. Distrib. Inc.*, 130 B.R. 427 (Bankr. S.D.N.Y. 1991); *In re Sunstate Dairy & Food Prods. Co.* 145 B.R. 341 (Bankr. M.D. Fla. 1992); *In re Bosler Supply Group*, 74 B.R. 250 (N.D. Ill. 1987).

In *In re Georgetown Steel Co., LLC*, 318 B.R. 340 (Bankr. D.S.C. 2004), a bankruptcy court reviewed and then rejected the holdings in cases such as *Pittsburgh-Canfield*; *In re Dairy Mart Convenience Stores, Inc.*, 302 B.R. 128 (Bankr. S.D.N.Y. 2003); *In re Bridge Information Systems, Inc.*, 288 B.R. 133 (Bankr. E.D. Mo. 2001); and *In re Arlco, Inc.*, 302 B.R. 128 (Bankr. S.D.N.Y. 1999). Faced with a factual situation almost identical to this case, the *Georgetown* court correctly noted:

Rather than presuming that a senior secured creditor would always assert its rights in a reclaiming creditor's goods as the valuation cases seem to do, in this case no senior secured creditor objected to the relief sought . . . and at the time of the sale of Debtor's assets, including inventory, excess funds remained for distribution . . . [I]n the matter before the Court, the issue no longer involves the competing interests of the secured creditors and the Reclamation Creditors. . . . [T]he Court sees no reason to deviate from the language of § 546(c). . . . Based upon the language of the statute, . . . , the Reclamation Creditors should be entitled to that which § 546(c)(2) provides.

Id. at 348, 351. The *Georgetown* decision, like the others cited by McKesson, provides further support that the Sixth Circuit's decision to affirm was well grounded in law.

D. The Sixth Circuit's Decision Has Not Had and Will Not Have a "Devastating" Impact on Secured Lending.

The Debtor states that the Sixth Circuit's decision has resulted in a "sea of uncertainty" throughout the lending and business communities and predicts that lenders will be unwilling to make asset-backed loans. Those statements have no basis in reality.

Large commercial enterprises have filed and continue to file for bankruptcy throughout the United States since the Sixth Circuit's decision. Some of the larger retail bankruptcy cases include *Circuit City Stores* (E.D. Va.; 11/10/08); *Mervyn's* (D. Del.; 7/29/08); *KB Toys* (D. Del.; 12/11/08); *Boscov's* (D. Del.; 8/24/08); *Fortunoff Holdings* (S.D.N.Y.; 2/5/09); *Value City Department Stores* (D. Del.; 10/26/08); and *Gottschalks, Inc.* (D. Del.; 1/14/09). In each of these cases and many others, multiple reclamation claims have been asserted, while at the same time lenders continue to provide DIP financing. A simple review of the docket from any of these cases confirms that asset based financing, including DIP financing, is as vibrant as ever, even while sellers continue to assert reclamation claims and their rights under 11 U.S.C. § 503(b)(9) and the current version of 11 U.S.C. § 546(c).

In the aftermath of the Sixth Circuit's decision here, legal commentators are in general agreement that the *Phar-Mor* decision was correctly decided. See e.g., *Vendor Whose Reclamation Claim Is Trumped by DIP Lender's Superpriority*, 2008 Comm. Fin. News. 64. One legal commentator even praised the Sixth Circuit for restoring reclamation as a viable remedy in bankruptcy cases to defrauded sellers, following recent years in which a select few bankruptcy judges disregarded the plain text of 11 U.S.C. § 546(c) and § 2-702 of the UCC and the rights of defrauded sellers, such as McKesson. See *Sixth Circuit's Phar-Mor Decision Breathes New Life Into Reclamation Remedy*, Sept. 2008 Am. Bankr. Inst. J. 14. These articles refute the Debtor's hyperbolic assertions that the Sixth Circuit's decision is "devastating" and a "disaster" and has resulted in a "vast amount of debate."

Asset based lenders routinely exclude certain collateral from their borrowing bases, whether it is aged receivables or ineligible inventory. In this case, the Sixth Circuit correctly concluded that when a seller reclaims goods, the debtor/purchaser lacks title to those goods and the reclaiming seller's interest in those goods is superior to all types of secured creditors. Just as a secured creditor has no right to claim a superior interest in stolen goods which happen to be in the possession of a debtor, a secured creditor has no right to claim a superior interest vis-à-vis a reclaiming seller in goods that were obtained by a debtor through fraud (by concealing the imminent

bankruptcy filing from the seller) if that seller properly asserts a reclamation claim to recover its goods.

E. The Debtor Lacks Standing to Assert Secured Creditor Rights under Section 2-702(C) of the UCC When No Such Secured Creditor Exists.

The core of the Debtor's Petition involves a transparent attempt to assert rights of its former secured creditors under § 2-702(C) of the UCC. This attempt is improper. That section provides that the seller's right to reclaim goods is "subject to" a good faith purchaser, which in this case the Debtor contends is the paid-off lenders. Under the text of § 2-702(C), it is a good faith purchaser (assuming, *arguendo*, that the lenders qualified as good faith purchasers, which for the reasons explained above they do not) and not a buyer/debtor who has the right to assert priority over reclamation rights under certain circumstances. Simply put, the Debtor does not have standing to avail itself of the protections afforded good faith purchasers under § 2-702(C). The policy – of protecting a secured lender that qualifies as a good faith purchaser – underlying that statute does not exist here when the DIP Lenders were paid off in full and have no claim to the remaining surplus. This point was recognized by the Eighth Circuit in *Griffin*, 795 F.2d 676, 680.

In *Hartford Underwriters Ins. Co. v. Union Planters Bank (In re Henhouse)*, this Court addressed the issue of whether a third party may assert rights

conferred on another party by statute. *Henhouse*, 530 U.S. 1, 7 (2000). In that decision, a party other than the trustee sought to assert the right of surcharge under 11 U.S.C. § 506(c). This Court found that this statute had to be read with exclusivity and, therefore, since the statute stated that a “trustee” could assert a surcharge, that only a “trustee” to the exclusion of all others could assert such a claim. Had Congress intended for any other party to assert a surcharge, the statute would have so stated. *Henhouse*, 530 U.S. at 7.

Similar to the reasoning in *Henhouse*, only a good faith purchaser has standing to utilize § 2-702(C) of the UCC. Had the enactors of Article 2 of the UCC intended to allow buyers/debtors to step into the shoes of satisfied secured creditors (in their alleged capacity as good faith purchasers), they would have written the statute that way. They did not. As a result, because no secured party exists, the Debtor cannot utilize UCC § 2-702(C) to defeat the statutory protections of 11 U.S.C. § 546(c) (1998) afforded McKesson and the other reclaiming sellers.

For this reason, the Debtor lacks standing under UCC § 2-702(C) and the Petition must be denied.

CONCLUSION

The Sixth Circuit's decision affirming McKesson's administrative claim was well reasoned and based upon the applicable statutes, existing precedent and the facts. In particular, the Debtor's DIP Lenders were not good faith purchasers, a factual finding that completely undermines the overriding argument set forth in the Petition. There is no reason to review the Sixth Circuit's decision and the Petition must be denied.

Respectfully submitted,

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